

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

KYSHAWN LEE THOMPSON,

Defendant and Appellant.

B289184

(Los Angeles County
Super. Ct. No. VA144457)

APPEAL from a judgment of the Superior Court of Los Angeles County, Debra Cole-Hall, Judge. Affirmed in part, reversed and vacated in part, and remanded with directions.

Paul Kleven, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

In February 2017, defendant Kyshawn Thompson fired gunshots at a woman he had formerly dated while she was at home. The next day, defendant fired gunshots at several men who were working on a car in a back alley that was located in disputed gang territory. Defendant had tattoos associated with the 76 East Coast Crips street gang and spoke words indicating his gang affiliation during the second incident.

Based on these two incidents, a jury found defendant guilty of attempted murder of the woman and two of the men, among other crimes. The trial court imposed the same sentence on the attempted murder counts (counts 1, 2, and 8), which sentence included a gang enhancement. The court also imposed a five-year prior serious felony enhancement (count 5).

Defendant challenges his sentence on two grounds. First, he argues that the trial court erred in imposing the gang enhancement with respect to attempted murder of the woman (count 8) because the People did not allege a gang enhancement or proffer facts of gang activity regarding that incident, and the jury did not find that incident involved gang activity. Second, defendant contends the trial court should be allowed to exercise its discretion to strike the prior serious felony enhancement pursuant to recent statutory amendments that provide for such discretion. The People agree as to both challenges, as do we.

We reverse the gang enhancement on count 8, vacate the sentence, and remand for resentencing. In all other respects, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

We forego a detailed discussion of the factual and procedural background and provide only a brief summary of the background to understand the sentencing issues in this appeal.

We set forth additional background as relevant to those sentencing issues in the discussion section.

1. On February 20, 2017, defendant shot Jessica D. at her home

Defendant went on two dates with Jessica D. in or around early February 2017. On or around February 13, 2017, Jessica D. broke off that relationship. At around 11:00 p.m. on February 20, 2017, defendant appeared at Jessica D.'s home and shot her with a firearm in her left thigh, right breast, and right side. Jessica D. shut the door and ran toward her kitchen. She then called 911, reported that defendant shot her, and was taken to a hospital where she received treatment for her gunshot wounds.

2. On February 21, 2017, defendant shot or threatened four men with a handgun in disputed gang territory

At around 4:00 p.m. on February 21, 2017, Richard A., Gilberto C., and Juan M. were installing speakers in a car in an alley when defendant approached them with a handgun. The rival 76 East Coast Crips and Florencia 13 gangs disputed the territory in which the alley was located. Defendant had tattoos associated with the 76 East Coast Crips including "76" and "ECC."

Defendant asked the three men whether they were in a gang. They responded in the negative. Then defendant said, "fucking Florencia" or the like, and opened fire. Juan M. found refuge in the car, but Gilberto C. and Richard A. were shot. Defendant fled on foot.

G.A. was inside his house when he heard the gunshots. He then ran outside to the alley and followed defendant in his car. When he caught up with defendant at a parking lot located in

Crips territory, defendant pointed a gun at him. Defendant then put the gun away, said “fuck Bloods,” got into a white car, and fled. On March 31, 2017, defendant was arrested.

3. A jury found defendant committed attempted murder and other offenses

A jury found defendant guilty of attempted premeditated murder of Richard A., Gilberto C., and Jessica D. pursuant to Penal Code¹ sections 664² and 187, subdivision (a)³ (counts 1, 2, and 8, respectively); assault of G.A. with a firearm pursuant to section 245, subdivision (a)(2)⁴ (count 5); possession of a firearm by a felon⁵ pursuant to section 29800, subdivision (a)(1)⁶

¹ Undesignated statutory citations are to the Penal Code.

² “Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished where no provision is made by law for the punishment of those attempts” (§ 664.)

³ “Murder is the unlawful killing of a human being . . . with malice aforethought.” (§ 187, subd. (a).)

⁴ “[A]ny person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars (\$10,000) and imprisonment.” (§ 245, subd. (a)(2).)

⁵ The parties stipulated that defendant incurred a prior felony conviction for robbery for the purpose of that charge. “Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” (§ 211.)

(count 6); and unlawful possession of ammunition pursuant to section 30305, subdivision (a)(1)⁷ (count 7). The People did not allege a count 3 and dismissed count 4 (attempted murder of Juan M.).

4. The trial court imposed a sentence that included a five-year enhancement on count 5 (assault with a firearm) and a gang enhancement on count 8 (attempted murder of Jessica D.)

The trial court imposed an indeterminate sentence of 165 years to life to run consecutively to a determinate term of 23 years as set forth below.

On each of counts 1, 2, and 8 (attempted willful, deliberate, premeditated murder of Richard A., Gilberto C., and Jessica D., respectively), the trial court imposed 15 years to life, doubled to 30 years because of the “strike” prior⁸ (§ 667, subd. (e)(1)), plus a

⁶ “Any person who has been convicted of, or has an outstanding warrant for, a felony under the laws of the United States, the State of California, or any other state, government, or country, or of an offense enumerated in subdivision (a), (b), or (d) of Section 23515, or who is addicted to the use of any narcotic drug, and who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony.” (§ 29800, subd. (a)(1).)

⁷ “No person prohibited from owning or possessing a firearm under Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9 of this title, or Section 8100 or 8103 of the Welfare and Institutions Code, shall own, possess, or have under custody or control, any ammunition or reloaded ammunition.” (§ 30305, subd. (a)(1).)

⁸ Defendant sought dismissal of his “strike” prior for robbery (fn. 5, *ante*) in the interest of justice pursuant to

consecutive term of 25 years to life for a firearm enhancement (§ 12022.53, subd. (d)). The court imposed and stayed a three-year great bodily injury enhancement (§ 12022.7, subd. (a)) on each count for a total term of 55 years on each count to run consecutively.

On count 5 (assault with a firearm), the trial court imposed the high term of four years (§ 245, subd. (a)(2)), doubled to eight years because of the “strike” prior (§ 667, subd. (e)(1)), plus 10 consecutive years for a gang enhancement (§ 186.22, subd. (b)(1)), plus five consecutive years for the prior serious felony conviction (§ 667, subd. (a)(1)) for a total of 23 years. The trial court also imposed and stayed an additional midterm sentence of four years for the firearm enhancement (§ 12022.5) and stayed the “one and the three-year priors . . . because they are from the same case.” (See §§ 654, 667.5, subd. (a)–(b).)

On each of counts 6 (possession of a firearm by a felon) and 7 (unlawful possession of ammunition), the trial court imposed the midterm of two years, plus three years and one year pursuant to section 667.5, subdivisions (a) and (b). The court stayed sentence on counts 6 and 7 pursuant to section 654. Defendant received 486 days’ credits for time served.

Defendant timely appealed.

People v. Superior Court (Romero) (1996) 13 Cal.4th 497. The trial court denied that motion, reasoning that “the criminal activity continued on” after defendant was convicted on October 31, 2011 for that strike.

STANDARD OF REVIEW

“An unauthorized sentence . . . presents a pure question of law, which we review de novo.” (*People v. Tua* (2018) 18 Cal.App.5th 1136, 1140.)

DISCUSSION

Defendant makes two arguments. First, the trial court erroneously imposed a gang enhancement on count 8 even though the People alleged no such enhancement and did not proffer any facts suggesting gang activity regarding that count, and the jury did not find that count 8 involved gang activity. Second, the trial court should exercise its newly conferred discretion to strike the five-year serious felony enhancement that it imposed on count 5. The People agree, as do we.

A. The Trial Court Erred In Imposing A Gang Enhancement On Count 8, Thus Requiring Resentencing

Section 186.22, subdivision (b)(1) provides for a sentencing enhancement where the defendant “is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.”

Here, the People alleged an enhancement pursuant to that subdivision as to counts 1 and 2 in the information but did not allege a gang enhancement as to count 8. The jury found defendant participated in a criminal street gang pursuant to section 186.22, subdivision (b)(1)(C) in connection with counts 1 and 2. It made no such finding with respect to count 8.

The trial court thus erred in imposing a gang enhancement in sentencing defendant on count 8.

B. Remand Is Necessary To Allow The Trial Court To Exercise its Discretion To Strike The Serious Felony Enhancement Under Recent Statutory Amendments Giving Courts Discretion To Do So

A jury convicted defendant and the trial court sentenced him in 2018. His sentence includes one five-year serious felony enhancement pursuant to section 667, subdivision (a)(1), which the trial court imposed on count 5 as set forth above.

“Effective January 1, 2019, recent amendments to sections 667 and 1385 delete language prohibiting a judge from striking a prior serious felony conviction for purposes of eliminating a five-year sentence enhancement. Instead, the court now may exercise discretion to strike a prior serious felony in the interest of justice.” (*People v. Pride* (2019) 31 Cal.App.5th 133, 142; accord, *People v. Marquez* (2019) 31 Cal.App.5th 402, 414.)

Those amendments are contained in Senate Bill No. 1393 (2017–2018 Reg. Sess.) (S.B. 1393). Because S.B. 1393 became effective during the pendency of this appeal, and defendant’s case is not yet final, the amendments apply retroactively to defendant’s sentence. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971–974.)

Pursuant to the amendments, we remand for the trial court to exercise its discretion unless the trial court clearly indicated it would not have stricken the prior serious felony enhancement when it originally sentenced defendant even if it had the discretion to do so. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.)

The record does not support any such futility in remanding the case so that the trial court may exercise its new-found discretion. For example, the trial court stayed the great bodily injury enhancements on counts 1, 2, and 8; selected and stayed the midterm firearm enhancement on count 5; selected the midterm sentence for counts 6 and 7; and stayed the entirety of the sentence on counts 6 and 7. On this record, we cannot conclude the trial court would not have stricken the section 667, subdivision (a)(1) enhancement if it had the discretion to do so at the time of the sentencing hearing.

DISPOSITION

The judgment of conviction is affirmed. The gang enhancement on count 8 is reversed. Defendant's sentence is vacated, and the matter is remanded to the trial court for resentencing. The trial court shall then also determine whether to strike the enhancement imposed under section 667, subdivision (a)(1). The trial court shall amend the abstract of judgment and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.